



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: Eligibility of "Historic Wetlands" for ISTEA Funding Date: FEB 18 1997

From: Chief Counsel Reply to: HCC-31
Attn. of:

To: Anthony R. Kane
Executive Director (HOA-3)

This memorandum responds to a request we received for a legal opinion regarding whether ISTEA program funds may be used to improve or restore wetlands that were affected by past Federal-aid highway projects, even if there is no current Federal-aid project taking place in the vicinity. It is our opinion that such activities are permissible under current law and, therefore, no statutory changes are needed.

We base our opinion on several provisions of Title 23, United States Code. First, both the National Highway System and Surface Transportation Programs, which were created by ISTEA, allow states to use Federal-aid funds for wetlands mitigation activities. 23 U.S.C. §§ 103(i)(13) and 133(b)(11). These provisions are worded identically, and permit Federal-aid highways funds to be put towards efforts to conserve, restore, enhance, and create wetlands. Both provisions state that "[c]ontributions to such mitigation efforts may take place concurrent with or in advance of project construction." We believe this statement may fairly be interpreted as permissive, rather than restrictive. In other words, while states are permitted by these two provisions to use Federal-aid funds for the stated purposes concurrent with or in advance of project construction, nothing in the language of §§ 103(i)(13) or 133(e)(11) forbids states from doing so after a project has been completed. No specific prohibition having been written into these provisions, we do not believe one should be implied.


We believe two other provisions of Title 23, when read together, provide a basis for funding so-called "historic wetlands" restoration projects. The first is § 133(b)(1), which permits Surface Transportation Program (STP) funds to be spent for "mitigation of damage to wildlife, habitat, and ecosystems caused by a transportation project funded under this Title." Under § 101 of Title 23, the term "project" means "an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed." This definition, we believe, is broad enough to encompass not just new or even recent projects, but *any* highway that has been constructed using Title 23 funds.

A final category of funding for which historic wetlands projects may be eligible is that available under the STP for transportation enhancement activities (TEAs). 23 U.S.C. § 133(e)(8). The definition of TEAs (23 U.S.C. § 101) does limit them to those related to particular "projects" (as

defined in § 101), but does not specify any particular time frame in which they must take place. Historic wetlands projects could qualify for STP funds if legitimately tied to one of the categories of TEAs set forth in the definition, such as scenic beautification or mitigation of water pollution due to highway runoff.

To sum up, we believe that so-called historic wetlands improvement projects may be funded under several provisions of current law. That being the case, we do not believe new legislation is needed to address this issue.

We hope this memorandum has been helpful to you. Should you have any further questions, please feel free to call Brett Gainer of my staff at 202-366-6197.


X Jerry L. Malone

cc: Mr. Howard Corcoran
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Finance and Operations Division
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